Supreme Court, U. S.
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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1976

NO. 76-54

WILLIAM BRUCE BOURGEOIS, JR.
AND
NANCY A. MAYO
Petitioners

versus

SEAFARERS PENSION PLAN a/k/a
SEAFARERS WELFARE PLAN
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, William Bruce Bourgeois, Jr. and Nancy A. Mayo, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 7, 1976.

OPINION BELOW

The judgment of the Court of Appeals was rendered without written opinion on April 7, 1976. Rehearing and Rehearing En Banc were denied on June 1, 1976. The District Court for the Eastern

District of Louisiana rendered written findings. All are attached in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 7, 1976. A timely petition for rehearing was denied on June 1, 1976. A motion to stay issuance of the mandate was filed on June 4, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1) and 28 U.S.C. § 2101.

QUESTIONS PRESENTED

1. Whether the District Court can decide issues of fact on a Motion for Summary Judgment.

2. Whether the interpretation of Article 1, Section 8 of the Seafarers' Pension Regulations is a matter of intent, thus inappropriate for summary judgment.

3. Whether summary judgment was appropriate where arbitrary and capricious conduct and waiver of the disqualification provision were alleged in District Court.

4. Whether the District Court erred when it applied the New York, instead of the Louisi-

ana, limitation or prescriptive period, and alternatively erred when it applied the New York six year, instead of the ten year, limitation or prescriptive period.

5. Whether the application of Local Rule 21 after oral argument in this case is desirable where otherwise a written opinion may conflict with opinions of other federal appellate circuits.

REGULATIONS AND STATUTORY PROVISIONS INVOLVED

38 U.S.C. § 331

> For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's willful misconduct.

5TH CIRCUIT LOCAL RULE 21

> When the court determines that any one

> or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.
>
> In such case, the court may in its discretion, enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

LOUISIANA CIVIL CODE ARTICLE 3544:

> In general, all personal actions except those before enumerated, are prescribed by ten years.

NEW YORK CIVIL PRACTICE ACT, SECTION 53

> An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues.

NEW YORK CIVIL PRACTICE LAW & RULES, SECTION 213

> The following actions must be commenced within six years:
> 1. An action for which no limitation is specifically prescribed by law;
> 2. An action upon a contractual obligation or liability express or implied, except as provided in article 2 of the Uniform Commercial Code;

NEW YORK CIVIL PRACTICE LAW & RULES, SECTION 218(b)

> (b) Cause of action accrued and not barred at effective date. Where a cause of action accrued before and is not barred when this article becomes effective, the time within which an action must be commenced shall be the time which would have been applicable apart from the provisions of this article, or the time which would have been applicable if the provisions of this article had been in effect when the cause of action accrued, whichever is longer.

SEAFARERS' PENSION REGULATIONS - ARTICLE 1, SECTION 8

> A Disability Pension shall not be payable for any disability resulting from service in the Armed Forces of the United States if a military disability pension is payable therefor. No Disability Pension shall be payable for any disability resulting from services in the Armed Forces of any other Country.

STATEMENT OF THE CASE

Petitioners' deceased, William Bruce Bourgeois, was a member of the Seafarers International Union, Atlantic, Gulf and Inland Waterways District and as such sailed for "contracting employers" principally out of the Port of New Orleans from June, 1951 until or about June 2, 1963. During this period Bourgeois

earned pension credits for twelve (12) years of sailing and at least five thousand one hundred fifty-two (5,152) days of "covered employment" for which contributions were made on his behalf to the Seafarers' Welfare & Pension Plans.

On or about June 6, 1963, Bourgeois suffered a heart attack which was diagnosed by a physician servicing the Seafarers Welfare Plan as a recurrence of auricular fibrillation. He was ultimately declared to be "not fit for duty permanently" on or about October 31, 1963. On December 11, 1963, Bourgeois filed an application for a disability pension. To be eligible for a disability pension after permanent and total disability it was necessary that the applicant have pension credits for at least four thousand three hundred eighty(4,380) days of covered employment (12 years), 90 days of employment in the last calendar year and at least one day in the six months preceding his application. There is no age requirement for disability. Bourgeois met all these require-

ments. However, his application was denied by action taken by the Board of Trustees at a meeting held on August 5, 1964. The Board based its denial on the grounds that Bourgeois was "not eligible because he is receiving a Disability Pension from the Armed Forces."

Since that time, Bourgeois and his substituted plaintiffs have made numerous requests for pension and/or disability and death benefits under the applicable provisions of the Plan. However, no relief has been provided.

On December 13, 1972, Bourgeois filed a petition in the Civil District Court for the Parish of Orleans, No. 549-269, Division "D", entitled "William Bruce Bourgeois v. Seafarers' International Union of North America." This action was subsequently dismissed without prejudice.

A complaint was filed by William Bruce Bourgeois in the United States District Court for the Eastern District of Louisiana on June 1, 1973. Service of process was effectuated on defendants on or about June 11, 1973. Mr.

Bourgeois passed away on May 3, 1974. His sole heirs and legatees, William Bruce Bourgeois, Jr. and Nancy A. Mayo, were properly substituted as parties plaintiff on the 12th day of August, 1974. A Supplemental and Amended Complaint was filed on the 9th day of October, 1974.

Defendant Seafarers' Pension Plan filed a Motion for Summary Judgment, which was argued before the District Court Judge on the 11th day of December, 1974. After hearing counsels' arguments, the Honorable R. Blake West, District Court Judge, stated as follows:

> "All right. As I stated previously, I feel New York law applies in this case.
>
> I think there are several possible bases for supporting the granting of a summary judgment in this case and I will furnish full written reasons shortly but for the present I think it is tradition to hold that the prescriptive period of six years did not begin to run until the final denial of his pension benefits in August of 1964. No judicial remedy was available to the Plaintiff until he had exhausted his administrative relief, as provided by the pension plan. Since the New York six-year statute of limitations went into effect September 1, 1963, twelve months before the Plaintiff

had exhausted his administrative remedies August 8, 1964, the Plaintiff's cause prescribed six years later August 8, 1970. The suit was filed June 1, 1973, approximately three years too late.

Hence, it is ordered that the Defendants' Motion for Summary Judgement is hereby granted."

The District Court rendered its written reasons on the 29th day of January, 1975, basing its decision solely on the fact that Bourgeois was disqualified from receiving a Seafarers' Pension under the provisions of Article 1, Section 8 which denies a pension where one has suffered a disability resulting from service in the armed forces and has received a military disability pension therefor. These written reasons did not in any way correspond to the judge's reasons given at oral argument.

Plaintiffs then filed a Notice of Appeal in the Fifth Circuit Court of Appeals on the 26th day of December, 1974. The oral argument was held on April 6, 1976.

In a per curiam opinion the court affirmed under Local Rule 21 without a written opinion

on April 7, 1976. On June 1, 1976 the petition for rehearing and rehearing in banc was denied.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT CANNOT DECIDE ISSUES OF FACT ON A MOTION FOR SUMMARY JUDGMENT; IT CAN ONLY DETERMINE WHETHER THERE ARE GENUINE ISSUES TO BE TRIED.

The argument of counsel before the District Court disclosed genuine issues of material fact. Petitioners submitted an affidavit which alleged, inter alia, that the deceased contracted rheumatic fever when he was five years old and that the onset of this disease during his service in the armed forces was a recurrence of this childhood disorder. On the other hand, respondents contended that the deceased acquired rheumatic fever while serving in the United States Navy. This contention was based on a medical report of one Dr. Middleton which may have summarized medical history provided by Mr. Bourgeois.

The District Court Judge took notice of these issues of fact and requested counsel to

comment thereon during the oral argument. Petitioners submit that these issues of fact are both genuine and material, precluding summary judgment, because in the absence of a disability resulting from service, a pension in this case was due and payable.

There is no reliable way, at the present state of the record and the limited discovery, to determine the reason why the deceased was granted a government pension. The District Court stated that the record shows that Bourgeois was declared to be disabled as a result of service in the armed forces. The record, however, shows only that Bourgeois was discharged from the Navy and awarded a service connected disability pension. Furthermore, the District Court states that the examining physician, Dr. Middleton, declared Bourgeois dis abled "by reason of rheumatic fever acquired while in the service of the United States in 1943." Appendix, p. . But Dr. Middleton did not state that this disease was acquired while Bourgeois was in the armed forces. Dr.

Middleton's report states as follows:

> "The above captioned patient states that in 1943, while serving in the United States Navy he developed rheumatic fever and was hospitalized for a period of seventeen months."

Knowing that he acquired rheumatic fever as a child, Bourgeois could only have meant that he developed a recurrence or aggravation of that disease. In any event, there is no statement whatsoever that this disease resulted from service in the armed forces. Petitioners further contend that the pension regulation in question is not designed to deal with the facts present in this case, but is designed to deal with actual injuries received or tropical and other diseases initially acquired while in the armed forces.

The applicable statute, 38 U.S.C. § 331, provides for a disability pension for aggravation of a pre-existing condition, which would not come within "a disability resulting from services in the armed forces . . ." Considering these various interpretations and issues raised, summary judgment was improper.

Petitioners submit, however, that the District Court decided said issues, in its judgment and reasons therefor.

> "Notwithstanding plaintiff's affidavit to the effect that the rheumatic fever was first suffered by the deceased when he was a child, the record clearly shows that the deceased was declared to be disabled as a result of service in the armed forces of the United States, and that he did receive a pension from the armed forces for that disability; under the express provisions of Art. 1, Sec. 8 of the pension regulations this was sufficient grounds to exclude the deceased from the Pension Plan." Appendix, Reasons for Judgment.

The District Court cannot decide issues of fact on a motion for summary judgment; it can only determine whether there are genuine issues to be tried.

> "But the 'fundamental maxim' remains that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried." Heyman v. Commerce & Industry Insurance Co. 524 F.2d 1317, 1319-1320 (2nd Cir. 1975).

In reversing a summary judgment granted by the Honorable R. Blake West, District Court Judge, the Fifth Circuit Court of Appeals stated the rules that should be followed when

considering a motion for summary judgment:

> "In considering a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the district court must construe all pleadings liberally in favor of the party against whom the motion is made, James Talcott, Inc. v. Allahabad Bank, Ltd., 5 Cir. 1971, 444 F. 2d 451, cert. denied, 404 U.S. 940, 92 S.Ct. 280, 30 L.Ed.2d 253, and the motion should be granted only where the moving party is entitled to judgment as a matter of law and the record clearly shows that no genuine issue of material fact exists. Aulds v. Foster, 5 Cir., 1973, 484 F.2d 945; Ranger Insurance Co. v. Algie, 5 Cir. 1973, 484 F.2d 861; Pennsylvania v. Curtiss National Bank, 5 Cir. 1970, 427 F.2d 395." Dassinger v. South Central Bell Telephone Company, 505 F.2d 672, 674 (5th Cir. 1974).

Thus the District Court erred in deciding issues of fact based upon affidavits and/or medical reports.

> "The responsibility of the district judge on a motion for summary judgment is merely to determine whether there are issues to be tried, rather than to try the issues himself via affidavits." Jaroslawicz v. Seedman 528 F.2d 727, 731 (2nd Cir. 1975).

II. THE INTERPRETATION OF ARTICLE 1, SECTION 8 OF THE SEAFARERS' PENSION REGULATIONS, THE TERMS OF WHICH ARE DISPUTED, IS A MATTER OF INTENT. SAID QUESTIONS OF INTENT ARE INAPPROPRIATE FOR SUMMARY JUDGMENT.

Article I, Section 8 of the Seafarers' Pension Regulations provides as follows:

> "A disability pension to a person otherwise eligible shall not be payable for a disability resulting from services in the Armed Forces of the United States if a military disability pension is payable therefor."

The parties in this case disputed the meaning of the terms "a disability resulting from services in the Armed Forces . . ."

Petitioners submit that the interpretation of the above noted terms must be drawn from past actions by the parties including both the Seafarers' Pension Plan and the Seafarers International Union. The interpretation of Article 1, Section 8 is thus a matter of intent. Said questions of intent are inappropriate for summary judgment especially where, as here, discovery was incomplete. And this is so whether or not the ultimate interpretation of the provision is to be treated as a matter of law.

> "The interpretation of a contract, the terms of which are disputed, is very much a matter of the intent of the

> parties who enered into the contract. Questions of intent are particularly inappropriate for summary judgment." Fitzsimmons v. Best, 528 F.2d 692, 694 (7th Cir. 1976).

III. SUMMARY JUDGMENT IS INAPPROPRIATE WHERE ARBITRARY & CAPRICIOUS CONDUCT AND WAIVER OF THE DISQUALIFICATION PROVISION WERE ALLEGED IN THE DISTRICT COURT.

Assuming for the sake of argument that the disability did in fact arise, as claimed by respondents, from service in the Armed Forces, this still does not mean that there were no material issues of fact or that summary judgment was appropriate.

A.

The reasons for judgment of the District Court state:

> "The plaintiffs here have not alleged that the action of the Trustees in denying the deceased a pension because he was receiving military disability or in formulating the eligibility requirements excluding persons who were eligible for and received military disability pensions was either arbitrary or capricious."

With due respect to the District Judge, the Supplemental and Amended Complaint states at paragraph XI, ¶4 as follows:

"(4) Defendants' denial and subsequent decision to withhold distributions constitutes arbitrary and capricious administration of the Trust Fund because:

(a) Section 8 of the Pension Regulation is unreasonable and structurally defective on its face by virtue of its denial of benefits to covered employees who were unfortunate enough to have been disabled (and eligible for a small pension) during their military service in the U. S. Armed Forces, whereas other employees who were not eligible to receive military pensions were not denied eligibility.

(b) Section 8 was arbitrarily and selectively applied to some union members, while others were allowed to recover benefits under the Plan."

In Lugo v. Employees Retirement Fund of the Illumination Products Industry, 366 F. Supp. 99 (E.D. N.Y. 1973), the Court reasoned at p. 103 that a complaint which:

> ". . . raises serious questions of eligibility classifications and arbitrary conduct on the part of the trustees, . . . cannot be dismissed without evidence establishing a rational nexus or relationship between employee eligibility classifications and the trustees' conduct on one hand, and the objections of Section 302(c)5 on the other hand." (emphasis supplied)

The Court specifically noted that such a

test would also be applicable to motions for summary judgment in cases wherein complaints contain similar allegations.

Petitioners submit that the Supplemental and Amended Complaint sufficiently alleges arbitrary and capricious action on the part of the Trustees, and that petitioners were thus entitled to prove their allegations and have their day in court.

This issue could not have been decided on a Motion for Summary Judgment, especially where plaintiffs' allegations were completely overlooked. Thus, respondents were not entitled to judgment as a matter of law.

B.

The final important factual dispute concerns the question of waiver by the respondents or their duly authorized agents of the benefits of the disqualification provision. Mrs. Bourgeois, in her affidavit filed prior to the hearing on motion for a summary judgment, states that she and Mr. Bourgeois were told and informed by representatives of the SIU and

the Pension Plan that should he accumulate sufficient sea time and meet the other requisites under the said plan he would receive the appropriate disability and normal pensions. The affidavit further alleges a waiver of the disqualification provision both orally and by means of the furnishing of designation of beneficiary forms.

This raises a serious question of fact because if the waiver was effective, then the disability pension would, of course, be due and payable, making summary judgment entirely inappropriate.

This position was given considerable support by respondents' attorney Mr. Barker in his oral argument. Mr. Barker acknowledged that the union members in New Orleans felt that Mr. Bourgeois was entitled to the pension, and Mr. Barker, himself, attempted to assist in obtainment thereof. Since the Union knew of the small disability pension and of the service in the Armed Forces by Mr. Bourgeois,

it is no wonder that having waived the rights of the Union to invoke such provision, they felt that Bourgeois was entitled to the pension.

Certainly, summary judgment is inappropriate where, as here, arbitrary and capricious conduct and waiver of the disqualification provision were alleged in the District Court. Petitioners should have been allowed their day in court because this factual dispute did exist.

IV. THE DISTRICT COURT ERRED WHEN IT APPLIED THE NEW YORK, INSTEAD OF THE LOUISIANA LIMITATION OR PRESCRIPTIVE PERIOD, AND ALTERNATIVELY ERRED WHEN IT APPLIED THE NEW YORK SIX YEAR, INSTEAD OF THE TEN YEAR, LIMITATION OR PRESCRIPTIVE PERIOD.

Your Honors should remand this case for trial to consider the applicable statute of limitations. The District Court Judge, at oral argument, stated that he felt the six year statute of limitations of New York should apply. However, it is the well settled conflicts rule that a limitation or prescriptive period is procedural and not substantive. Therefore, the statute of limitations or prescriptive period of the forum state and not of the non-

forum state governs. Fidelity & Casualty Company of New York v. C/B Mr. Kim 345 F.2d 45 (5th Cir. 1965).

While it may be important in the administration of these plans to determine liability under the laws of the State of New York, only the nature, validity and construction of a contract are determined by the lex loci contractus; the remedy according to the lex fori.

> "The nature, validity, & construction of a contract are determined by the lex loci contractus; the remedy according to the lex fori." United States Leasing Corp. v. Keller, 290 So. 2d 427, 430 (La. App. 1974).

The limitation or prescriptive period acts as a bar to the remedy and, as here in the absence of peremption, the prescriptive period of the State of Louisiana, the forum state, applies.

Louisiana Civil Code Article 3544 provides the applicable prescriptive period in this case.

> "In general, all personal actions, except those before enumerated, are prescribed by ten years." La. C.C. Art. 3544

It is well established in Louisiana that where the facts alleged establish that both a cause of action ex delicto and ex contractu exists, as here, the ten year prescriptive period is applicable. United Gas Pipeline Company v. Socony Mobile Oil Company, Inc. 220 F.Supp. 685 (W.D.La. 1963). Furthermore, actions to secure pension benefits are "personal actions" within the meaning of Civil Code Article 3544, and are thereby subject to the ten year prescriptive period. State Ex. Rel. Spann v. Board of Trustees of the Police Pension Fund for the City of New Orleans 283 So. 2d 294 (La. App. 1973). Petitioners instituted this action within ten years from the date Bourgeois ceased employment in connection with the Union. Respondents admitted in their brief that as of June 6, 1963, Mr. Bourgeois had fulfilled all of the requisites and would have been awarded a pension except for the provisions of Article 1, Section 8. Petitioners' Complaint was filed on June 1, 1973, within the ten year period.

Respondents' contention that the New York limitation period is applicable to all legal issues and questions arising under the welfare and pension plan is insupportable for the additional following reasons.

The Fifth Circuit Court of Appeals has held that a forum selection clause, which is almost identical to the clause found in the pension and welfare plans at issue in this case, is not mandatory upon the parties. Keaty v. Freeport Indonesia, Inc. 503 F.2d 955 (5th Cir. 1974). This case is thus consistent with the general conflict rules that the limitation or prescriptive period of the forum state and not of the state specified in the forum selection clause is applicable.

In the alternative, even if New York law is used, there is also the dispute as to when the limitation period began to run. Petitioners contend that the prescriptive period began the date of Bourgeois' last service, June 6, 1963, while respondents contend that the significant date is that of Bourgeois' application for benefits on December 11, 1963. On

September 1, 1963 the New York statute of limitations was shortened from ten to six years. New York Civil Practice Law and Rules, Section 213. The provisions of the New York law governing the limitation period in effect prior to September 1, 1963 provided for a ten year limitation period. New York Civil Practice Act, Section 53.

Section 218(b) provides:

> "(b)Cause of action accrued and not barred at effective date. Where a cause of action accrued before and is not barred when this article becomes effective, the time within which an action must be commenced shall be the time which would have been applicable apart from the provisions of this article, or the time which would have been applicable if the provisions of this article had been in effect when the cause of action accrued, whichever is longer." N.Y.C.P.L.R. Section 218(b)

The pension plan became effective in 1961 which means that the drafters knew of the longer limitations period and incorporated the same, based on the law of New York as they existed in 1961.

Therefore, a further dispute exists as to when the prescriptive or limitation period

began to run. Petitioners' contention is that the New York ten year statute of limitations began to run on June 6, 1963, thus making this action timely even if based on New York procedural law. The District Court's written opinion passed over this issue.

V. APPLICATION OF LOCAL RULE 21 AFTER ORAL ARGUMENT IN THIS CASE IS UNDESIRABLE WHERE OTHERWISE A WRITTEN OPINION MAY CONFLICT WITH OPINIONS OF OTHER APPELLATE CIRCUITS.

The per curiam opinion of the Court of Appeals affirmed the decision of the District Court without written reasons based upon Local Rule 21 which states:

> "When the Court determines that one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision:
> (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous;
> (2) that the evidence in support of a jury verdict is not insufficient;
> (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole;
> (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion."

As discussed hereinabove and as noted during the oral argument in the appellate court, issues of material fact existed as to whether the deceased suffered from rheumatic heart disease as a child, which condition was subsequently aggravated during service in the United States Navy. These issues of fact were raised by the panel during the oral argument of respondents Seafarers Pension Plan. The Honorable Charles Clark affirmatively inquired of counsel for respondents that were not these matters issues of fact, precluding summary judgment. At the conclusion of said argument, both petitioner, Nancy A. Mayo Bourgeois, and her counsel, expected a judgment reversing the district court on precisely the grounds articulated by Judge Clark. The existence of such issues preclude summary judgment.

> "Since there were genuine issues of material fact, it was improper for the district court to grant summary judgment for National. Three issues of material fact are controverted by the parties and require further proceedings on the merits. First, appellants Solomon & Schuster maintain that Herbert Solomon was never

> treated for arteriosclerotic heart disease . . . . We, of course, do not express any opinion as to the validity of these factual allegations. Our holding here is merely procedural. Since summary judgment is a 'drastic device,' Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317, at 1320 (2d Cir. 1975), it should not be granted when there are major factual contentions in dispute." National Life Insurance Co. v. Solomon, 529 F.2d 59, 60-61 (2nd Cir. 1975).

Please also see Jaroslawicz v. Seedman, supra.

The issue of the existence of rheumatic heart disease prior to the deceased's service in the Navy is strikingly similar to the issue of treatment for heart disease in National Life Insurance Co. v. Solomon, Supra. Yet the 5th Circuit Court of Appeals apparently did not find that summary judgment was inappropriate in this case.

The judgment and reasoning of the District Court is unclear for the following reasons:

1. The District Court based its decision on grounds in its oral reasons from the bench that were completely different from its written reasons for judgment; and

2. The written reasons present alternative grounds for the District Court's conclusion, which conclusion is contradicted by the existence of disputed material facts and the allegations of the Supplemental and Amended Complaint.

1.

By virtue of the application of Local Rule 21 herein, petitioners can not be certain exactly what was the basis of the appellate court's decision, which makes it very difficult to prepare a writ of certiorari. Furthermore, the use of Local Rule 21 has caused uncertainty in another respect. The reasons District Judge West gave from the bench concerned the prescriptive period while his written reasons focused mainly on the provisions of pension plan. It is thus unclear which reasoning was the basis of the Fifth Circuit's judgment. If the affirmance was based on the prescriptive (limitation) period, petitioners may have a valid malpractice claim against the former attorney who failed to

file suit within the limitation period. By using Local Rule 21, the Fifth Circuit places petitioners in the position of having to relitigate this point.

The 5th Circuit Court might have followed the district court judge's conclusion referred to on page 9. This would mean that as a matter of law, anyone receiving a pension who was disabled while in the armed forces from a disease either acquired or aggravated, was ineligible to receive a seafarers' pension under Article I, Section 8 of the Seafarers Pension Regulations. However, the words "[n]otwithstanding plaintiff's affidavit" could be read as admitting a factual dispute in which case a summary judgment should never have been granted. This is a close question made even more difficult by the fact that the Court of Appeals affirmed the summary judgment without written opinion. By applying Local Rule 21, petitioners were given no tangible reasons for the affirmance.

In addition, the application of Local Rule 21, especially here, was unconstitutional as violative of the due process clause of the Constitution, Amendments V and XIV. By not providing adequate guidance, the Court of Appeals has made it impossible for petitioners to provide a full picture of the decision to this Honorable Court.

> "The most dramatic evidence of the importance which attorneys attach to a written record of the reason for a decision can be found in the view expressed by more than two-thirds of the attorneys surveyed that the due process clause of the Constitution should be held to require courts of appeals to write 'at least a brief statement of the reasons for their decisions.' Quite consistently, the respondents rejected the proposition that reducing the number of opinions issued is the most acceptable way to avoid long delays. As was the case with oral argument, attorneys were unwilling to buy speed with what appeared to them to be a sacrifice in the quality of the judicial product or the integrity of the process.
>
> "The specific values which the attorneys found in opinion writing help explain the significance which they attach to opinions. Some values are a function of the role of the Court of Appeals in the judicial system: the necessity for a reasoned disposition to furnish a

guide for district court judges and the bar in future cases, and the need to provide the Supreme Court with insight into the Court of Appeals reasoning when the Justices consider petitions for certiorari." Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, pp. 108-109 (1975). (emphasis added).

In Taylor v. McKeithen, 407 U.S. 191, 92 S.Ct. 1980, 32 L.Ed.2d 648 (1972), the Supreme Court of the United States remanded the case in a per curiam opinion. The Fifth Circuit Court of Appeals had reversed the District Court without written reasons. The Supreme Court remanded in order that it would be provided with insight into the Fifth Circuits' reasoning.

In April, 1976, the Solicitor General of the United States stated:

"The practice of delivering written opir - ions is also declining and now seems to be omitted in about 34 percent of decided cases at the court of appeals level. Some of the opinions shown as per curiam are actually only summary affirmances.

These trends are disturbing for they may erode the integrity of the law and of the decisional process. The intuitive wisdom of Anglo-American law has insisted upon oral argument and written opinions for very good reason. Judges, who are properly

not subject to any other discipline, are made to confront the arguments and to be seen doing so. They are required to explain their result and thus to demonstrate that it is supported by law and not by whim or personal sympathy." Bork, Robert H. Dealing with the Overload in Article III Courts, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79, 233 (1976).

Please also see the quotation from In re Greenburg, 442 Pa. 411, 280 A. 2d 379, at 70 F.R.D. 79, 246 (1976).

2.

It seems clear that if the Court of Appeals affirmed the District Court on the basis of the written reasons below, then a written opinion from the Fifth Circuit Court of Appeals would conflict with opinions of the Second and Seventh Circuits cited hereinabove. Questions of both disputed facts and intent are inappropriate for summary judgment and petitioners should be given the opportunity of a trial on the merits. Please see Jaroslawicz v. Seedman, supra; National Life Insurance Co. v. Solomon, supra; and Fitzsimmons v. Best, supra.

There is a strong liklihood that the reasons for the Fifth Circuit's affirmance would conflict with decisions of the Second and Seventh Circuits. In National Life Insurance Co. v. Solomon, supra, the Second Circuit avoided expressing any opinion as to the validity of statements concerning the appellant's heart disease. Further proceedings were in order since there were issues of material fact in dispute. In like manner, the Seventh Circuit, in Fitzsimmons v. Best supra, remanded for trial because the disputed terms of a contract were a matter of intent, inappropriate for summary judgment. By affirming the District Court's judgment using Local Rule 21, the Fifth Circuit may be in direct conflict with these other appellate circuits. The application of said Rule in this case has caused a conflict between circuits which can never be resolved unless a written opinion is rendered by the Fifth Circuit.

Counsel is well aware of the individual and thorough attention and consideration given each by the Fifth Circuit Court of Appeals.

Our plea for a written opinion is not meant to reflect that less was done in this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

KOERNER & BABST
A Professional Law Corporation

BY: _____
LOUIS R. KOERNER, JR.
730 Camp Street
New Orleans, La. 70130
(504) 581-9569
Counsel for Petitioners

Date: July 12, 1976

CERTIFICATE OF SERVICE

I hereby certify that on this____ ____ day of _____, 1976, copies of the Petition for Writ of Certiorari were mailed to counsel for all respondents. I further certify that all parties required to be served have been served.

KOERNER & BABST
A Professional Law Corporation

BY: _____
LOUIS R. KOERNER, JR.
730 Camp Street
New Orleans, La. 70130
(504) 581-9569
Counsel for Petitioners

[73] [73]

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DEC 12 1974

FILED
NELSON B. JONES
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM BRUCE BOURGEOIS	CIVIL ACTION
vs	NO. 73-1451
SEAFARERS' PENSION PLAN a/k/a SEAFARERS' WELFARE PLAN	SECTION "B"

JUDGMENT

The Court having on December 11, 1974, granted the motion of defendant for summary judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, SEAFARERS' PENSION PLAN a/k/a SEAFARERS' WELFARE PLAN, and against plaintiffs, WILLIAM BRUCE BOURGEOIS, JR. and NANCY HAYS, dismissing said plaintiff's complaint, each party to bear their own costs.

New Orleans, Louisiana, this 12th day of December, 1974.

NELSON B. JONES, Clerk

APPROVED AS TO FORM:

UNITED STATES DISTRICT JUDGE

--- DATE OF ENTRY DEC 13 1974

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WILLIAM BRUCE BOURGEOIS, JR. AND NANCY A. MATO

VERSUS

SEAFARERS PENSION PLAN a/k/a SEAFARERS WELFARE PLAN

CIVIL ACTION NO. 73-1451 SECTION "E"

REASONS FOR JUDGMENT

This matter came before the Court on motion of the defendant, Seafarers Pension Plan a/k/a Seafarers Welfare Plan for summary judgment. William B. Bourgeois, Sr., the deceased, died shortly after this suit was filed; thereafter, his son and widow were substituted as plaintiffs. The plaintiffs have conceded that they are not due any life insurance benefits and have limited their claim to that amount of pension the deceased would have collected had he been given the seaman's pension.

Summary judgment was granted in favor of the defendant, for the following reasons:

William B. Bourgeois, Sr. was a seaman. On June 6,1963 William B. Bourgeois, Sr. suffered a heart attack, and on December 11, 1963 he applied for disability and pension benefits under the Seafarers Pension Plan. In August, 1964, the defendant formally denied William B. Bourgeois, Sr.'s application for disability on grounds that the Seafarers Pension Plan disqualified employees of contributing companies whose disability was created by military service. The disqualification was in accordance with the express provisions of Article I, Section 8 of the Pension Regulations, which reads:

> "A Disability Pension shall not be payable for any disability resulting from service in the Armed Forces of the United States if a military disability pension is payable therefor. . ."

Before Mr. Bourgeois, Sr. applied for his seaman's pension, he applied for and received a military pension for disability resulting from service in the armed forces. In order to receive

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this military pension it was necessary that a determination be made that his disability resulted from the rheumatic fever that he had suffered while in the Navy; the record clearly shows that the deceased did not deny that his disability was the result of service in the military when he applied for the military pension. The plaintiffs, however, contend that the rheumatic fever was first suffered by Mr. Bourgeois, Sr. when he was a child, and, therefore, the pension exclusion does not apply.

The deceased was examined by Dr. Middleton in October, 1963 and declared disabled by reason of rheumatic fever acquired while in the service of the United States in 1943. Bourgeois was notified in January, 1964 by the Administrator pursuant to the Plan, subject to ratification of the trustees. The Board of Trustees acting on the report of Dr. Middleton declared Bourgeois not eligible, in accordance with Article I, Section 8 of the Pension Plan by reason of disability resulting from service in the Armed Forces of the United States in August, 1964.

The Pension Plan specifically provides that no person has any vested right or interest in the income or the property received or held by the Pension Trust or any vested right to benefits except through the fulfillment of the conditions and requirements set forth in the regulations. It is clear that the deceased failed to fulfill the requirements set forth in the regulation. That is to say, once the deceased, William Bruce Bourgeois, Sr. applied for and received the military disability pension, he excluded himself from those disabled seamen entitled to the seaman's pension, under the express provisions of Article I, Section 8 of the pension regulations.

Notwithstanding plaintiffs' affidavit to the effect that the rheumatic fever was first suffered by the deceased when he was a child, the record clearly shows that the deceased was declared to be disabled as a result of service in the armed forces of the United States, and that he did receive a pension

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from the armed forces for that disability; under the express provisions of Article I, Section 8 of the pension regulations this was sufficient grounds to exclude the deceased from the Pension Plan.

The plaintiffs here have not alleged that the action of the Trustees in denying the deceased a pension because he was receiving military disability or in formulating the eligibility requirements excluding persons who were eligible for and received military disability pensions was either arbitrary or capricious. The Trustees in this case, a bilateral group consisting of five Trustees representing employers and five Trustees representing the Union, were vested with full and absolute authority to formulate and adopt a pension program for the exclusive benefit of the employees, including the deceased here, and promulgate and establish rules and regulations for the administration and operation and to formulate and establish conditions of eligibility in their sole discretion without limitation. Where the Trustees are given such broad discretionary power, their decisions are subject to judicial correction only in cases where it can be shown that they have acted arbitrarily and capriciously toward those to whom their trust obligations run. Gomez v. John L. Lewis, et al, 414 F.2d 1312 (C.3, 1969).

Hence, there having been no genuine issue as to any material fact, and it having appeared that the movant was entitled to judgment as a matter of law, the defendant's motion for summary judgment was GRANTED.

New Orleans, Louisiana, this 29th day of January, 1975.

R. Beer

UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

NO. 75-1049

WILLIAM BRUCE BOURGEOIS, JR. and NANCY A. MAYO,

Plaintiffs-Appellants,

versus

SEAFARERS' PENSION PLAN a/k/a SEAFARERS' WELFARE PLAN,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(April 7 , 1976)

Before DYER, CLARK and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21. 1/

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

Supreme Court, U. S.
FILED
AUG 13 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 76-54

WILLIAM BRUCE BOURGEOIS, JR.
and
NANCY A. MAYO,
Petitioners

versus

SEAFARERS PENSION PLAN a/k/a
SEAFARERS WELFARE PLAN,
Respondents

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO.

WILLIAM BRUCE BOURGEOIS, JR. and
NANCY A. MAYO
Petitioners

versus

SEAFARERS PENSION PLAN a/k/a
SEAFARERS WELFARE PLAN
Respondents

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Defendants-Appellees in the court below, Seafarers Pension Plan a/k/a Seafarers Welfare Plan, Respondents, hereinafter called Seafarers, respectfully oppose the granting of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 7, 1976.

JURISDICTION

The statement of jurisdiction is correct.

QUESTIONS PRESENTED

Seafarers challenge the questions presented and respectfully suggest that the only two questions at issue are:

1. Whether the district court had before it all material evidence necessary for a summary judgment.

2. Whether the granting of the summary judgment was correct.

Seafarers deny that there was any issue of material fact to be resolved by the court on the motion for summary judgment; they further deny that the interpretation of Article 8 of the Seafarers Pension Regulations was a matter of intent; they further deny that the provisions of the Plan and the actions of the Trustees were arbitrary and capricious or that there had been a waiver of the disqualification provisions; the district court applied neither New York nor Louisiana law but the provisions of the Trust Agreement; Local Rule 21 of the United States Court of Appeals for the Fifth Circuit was properly applied.

REGULATIONS AND STATUTORY PROVISIONS INVOLVED

Seafarers respectfully suggest that 38 U.S.C. §331 is in no way involved. This definition of disability under the veterans' pension statutes is not before the Court for interpretation. It was raised by petitioner, complainant-appellant below, in argument in their brief to the Fifth Circuit and was answered by way of argument by defendants-appellees below. It does not require interpretation.

Fifth Circuit Rule 21 is not before the Court for interpretation and was properly applied in this case. Louisiana Civil Code Article 3544, New York Civil Practice, Section 53, New York Practice Law and Rules, Section 213, and New York Civil Practice Laws and Rules, Section 218 (b) were not the

basis of the decision by the district court as affirmed by the Circuit Court and hence are not before the Court for interpretation.

Seafarers Pension Regulations Article I Section 8 is not a federal statute but a material fact considered by the court.

The only statute before the Court is Section 302 of the Taft-Hartley Act, 29 U.S.C. §186.[1]

STATEMENT OF THE CASE

Since the issue of the material facts before the Court are essential and relevant, Seafarers respectfully restate the facts.

A. *THE DECISION OF THE DISTRICT COURT*

The court granted Seafarers' motion for summary judgment on December 12, 1974. The original complaint in this matter was filed on June 1, 1973 against the Trustees of the Seafarers Pension Plan domiciled in the State of New York seeking pension for disability by Bourgeois, an employee of various steamship lines, formerly covered by the Plan, for back pension and damages for disability occurring in June, 1963. Seafarers filed a motion for summary judgment on the grounds that Bourgeois' right of action had prescribed by the passage of ten years or was barred by laches. Seafarers later filed a supplemental motion for summary judgment for failure to state a claim, by reason of Bourgeois' disqualification under an express exclusion of the Trust Plan since he was disabled as a result of military service and was receiving a military disability pension. Bourgeois died and his widow

---

1. See Appendix A.

and major child were substituted as parties plaintiff in a supplemental and amending complaint filed by new counsel. This complaint added an additional claim for death benefits. Seafarers filed a second supplemental and amended motion for summary judgment alleging that by virtue of the provisions of the Plan the laws of New York were applicable to the Plan and under the laws of New York the action was barred by the New York statute of limitations or alternatively by Louisiana law on prescription that the action was barred by laches since Bourgeois was seeking to reform the provisions of a trust instrument and further that the complaint failed to state a claim by reason of the fact that the claim had been disallowed because the disability arose by reason of military service and Bourgeois was drawing military pension. Additional affidavits and documentary exhibits were filed. Originally at the hearing on December 11, 1974, the court orally indicated:

> "All right. As I stated previously, I feel New York law applies in this case.
>
> I think there are several possible bases for supporting the granting of a summary judgment in this case, and I will furnish full written reasons shortly; . . ."

The court then went on to indicate that it felt the New York statute of limitation of 6 years was applicable and began to run in August, 1964. Later in its written reasons, the court concluded, on the basis of complete and uncontested evidence before it, that the complaint failed to state a claim by reason of the express provisions of Article I Section 8 of the Pension Regulations which provided that a disability pension would not be payable for any disability resulting from

service in the Armed Forces of the United States if a military pension was payable therefor; the Bourgeois had applied for and was receiving a military pension for disability resulting from service in the Armed Forces prior to his applying for a pension from Seafarers. Petitioners have treated both grounds in their brief.

B. *THE CREATION AND COMPOSITION OF THE SEAFARERS PENSION PLAN*

Originally the Seafarers Welfare Plan was created by an Agreement and Declaration of Trust on July 1, 1950 through a trust instrument executed by various employers of members of the Seafarers International Union and the Union. In this document the trustees were given authority to create a separate Seafarers Pension Plan. On September 20, 1961, in a separate Agreement and Declaration of Trust, the trustees established this pension plan for the sole purpose of paying annuities or pensions to eligible pensioners and a death benefit for eligible pensioners, and provided for rules and regulations for the Pension Plan and the maintenance of adequate reserves based on actuarial reviews. It also specifically provided that in accordance with the provisions of the original Welfare Plan that the Plan was accepted by the trustees in the State of New York and all legal issues and questions arising thereunder would be construed and decided in accordance with the laws of the State of New York. Both Plans are so-called Taft-Hartley trusts, Section 302, 29 USCA 186, that is, they are bilaterally administered by an equal number of employer and union trustees who establish, interpret and administer the plans. For such trust plans to exist there must be collective bargaining agreements negotiated between the various employers and the union which in turn spells out the rate of contribution per employee per day

of employment for that particular employer to the Plans. No employee makes contributions from his wages and all funds are contributed solely by contracting contributing employers. Originally from 1950 until the adoption of the Seafarers Pension Trust in 1961 all contributions were made to the Seafarers Welfare Plan. After the creation of the Pension Trust Plan a certain percentage of the contributions was allocated to this Pension Plan to pay pensions and death benefits for pensioners. Commencing with the Welfare Plan in July, 1950, the original rate was 25¢ per day slowly increasing the $1.75 per day by October, 1961. The Plans are supervised by the Superintendent of Insurance of the State of New York. The New York statute of limitations for suits of this nature is Section 213 of the New York Civil Practice Law and Rules which went into effect on September 1, 1963. The Pension Regulations, originally adopted at the time the Pension Plan was created in 1961 and in effect at the time that it first applied to Bourgeois and still in effect when he became disabled, provided for certain minimum requirements of credited past service and continued service when permanent and total disability occurred. (Less than for normal retirement). To be eligible for a disability pension after permanent and total disability it was necessary that the applicant have pension credits for at least 4,380 days of covered employment (12 years), 90 days of employment in the last calendar year and at least one day in the six months preceding his application. There is no age requirement for disability. Bourgeois met these requirements. Specifically the Plan provided, at the time it was created with respect to all employees covered, in Article I Section 8:

> "Military Pension. A disability pension shall not be payable for any disability resulting from service in the Armed Service of the United States if a military disability pension is payable therefor. No disability pension shall be payable for any disability resulting from service in the Armed Forces of any other country,"

There has been no change in this provision.

The disability provided for was $150.00 per month through the year 1963.

The Pension Plan also provided for death benefits only if the pensioner died during the period while continuing to draw a pension and specified amount. Beneficiaries had no vested rights to the benefits except through the fulfillment of all the conditions and requirements set forth in the regulations. At the time of the creation of the Pension Plan, Bourgeois was given credit for 10 years of his past years of service prior to 1961 in accordance with the provisions of the Plan, served two more years and at the time of the determination of his disability had sufficient number of years and sufficient number of days coverage and was otherwise eligible at the time he applied in 1963 except for the disqualification because of disability resulting from military service, as previously determined by the Veterans Administration and the payment of the military pension.

C. *FACTS AS TO CLAIMANT*

The original plaintiff, William Bourgeois, was discharged from the Del Sud, a contracted vessel, making contributions on him, on June 2, 1963. He did not make application for pension benefits until December 11, 1963 and alleged that his last day of sailing was June 6, 1963. He had apparently previously consulted his own physician and made a claim for

military pension through the Veterans Administration. He was awarded $288.00 per month for service connected disability back to July, 1963. Prior to making application for the Seafarers Plan benefits he had himself examined by Dr. Middleton of the New Orleans Medical Clinic, one of the doctors for the Plan, who found that he was disabled because of progressive heart disease caused by rheumatic fever that he had developed, was hospitalized for a period of 17 months while serving in the United States Navy in 1943, and had been discharged as disabled then. He was notified that his claim for benefits was denied in January, 1964 by the Administrator. After request for reconsideration, the Trustees finally denied the claim on August 5, 1964 because his disability resulted from military service and he was receiving a military pension. Subsequently after his death, Mrs. Bourgeois, his surviving widow, was denied a death benefit because he was neither a pensioner nor an employee within the eligible period of time entitling her to death benefits.

REASONS FOR DENYING THE WRIT

ARGUMENT 1. *There is no substantial federal question here involved.*

The only statute properly before the Court is Section 302 of the Taft-Hartley Act, 29 U.S.C. §186. The provisions of this statute with respect to employee benefit plans, including pensions, health and welfare, and death benefits, with the exception of the requirement that such plans be controlled by an equal number of employer and employee trustees in order to receive contributions from employers, were substantially amended, succeeded and replaced by the Employee Retirement Income Security Act of 1974, Public Law 93-406, 88 Stat. 829, Title 29 §1001, passed September 2,

1974, as amended by Public Law 94-12, Title 4 402, 89 Stat. 47, Title 26 § 410, passed November 29, 1975.

ARGUMENT II. *The district court had all of the material facts before it when it granted summary judgment.*

The court on the basis of the voluminous affidavits and exhibits presented to it had a complete record before it. There was no genuine issue of material fact raised by the complaint or counter affidavit. All of the evidence available concerning the establishment of the Pension Plan, Bourgeois' entitlement to a pension, the documents and rulings of the Trustees forming the basis for his disqualification were before the court. These included the Interrogatories and Answers to Interrogatories with attached exhibits, the Trust Agreement and Plan, the sailing time records, last discharge documents and total payments made on his account, the records of the Veterans Administration showing payment of a total disability benefit in the sum of $288.00 per month beginning in August, 1963, Dr. Middleton's letter of October 31, 1963 disgnosing progressive heart disease from rheumatic fever incurred in military service, the original letter denying benefits of January 30, 1964, the action of the Trustees on reconsideration of August 5, 1964, and the reasons for the denial, the application of Bourgeois for benefits, and the history, nature of the Plan, effective date and New York law.

Although given an opportunity to do so, the survivors of Bourgeois countered only with an affidavit, alleging sketchy facts, to the effect that he had suffered from rheumatic fever since he was 5 years old; that he was discharged from military service with a disability, receiving a pension of

$19.00 per month, that the union and the Pension Plan had knowledge of his condition or disability and that he had been informed that he would be eligible to receive a normal or disability pension despite this and believed that his disability had been waived and he was building time toward a pension.

Bourgeois began sailing in 1951 before the Pension Plan was established in 1961. He was given credit for unearned past service, as were all others, in his case 10 years when the Plan was originally established. Regardless of his previous childhood history of rheumatic fever or obvious partial disability pension from the military service which he drew while sailing, this did not disable him from sailing. The Plan when created in 1961 contained the express provision disqualifying otherwise eligible employees only if they were disabled as a result of and actually drawing military pensions for total permanent disability. Bourgeois had actual or constructive knowledge of the provisions of the Plan since such plans must be published to participants under the provisions of the Welfare & Pension Plan Disclosure Act, 29 USC 301 et seq., passed in 1958. Such express written provisions of the Plan which interdependently affect all beneficiaries could not be waived by oral representations, if they were actually made, to the deceased Bourgeois. While sailing Bourgeois received coverage under the Welfare Plan and was covered by the Pension Plan fully making him eligible either for a normal pension at age 65 had he been able to serve the required time or for a disability pension had he been disabled for reasons other than as a result of military service and secondly, actually receiving a military pension. The counter facts alleged by Petitioners in the affidavit were not material to the decision of the Court. Quite obviously the court did not consider the mere allegation although made in an affidavit that

some unknown individuals or representatives of the union had promised the deceased a pension could in any wise vary the express written provision of the Trust Plan disqualifying Bourgeois from receiving a pension and the action of the Trustees in applying this could be waived other than by formal action of the Trustees. This was never alleged.

ARGUMENT III. *The provisions of the Plan and the Trustees' action in applying it were neither arbitrary nor capricious.*

Petitioners dispute the district court's conclusions that the Trustees correctly found that Bourgeois' disability resulted from service in the Armed Service of the United States.

Article I Section 8 of the Seafarers Pension Regulations provide:

> "A disability pension shall not be payable for any disability resulting from service in the Armed Forces of the United States if a military pension is payable therefor."

Two conditions for disqualification must be made. One, the disability must be one resulting from service in the Armed Forces of the United States, and two, the employee must be receiving a military disability pension. It is admitted that Bourgeois was declared eligible effective in August, 1963 to receive a $288.00 per month disability pension resulting from disability occurring from service in the Armed Service. We respectfully suggest that the argument on this is purely one of semantics. Petitioners' argument is that the proper interpretation of this clause by the Trustees should have been "the disability must have resulted from service in the Armed

Forces of the United States." Petitioners alleged that both the Trustees and the district court were in error in this finding that Bourgeois' disability *resulted* from service in the armed Forces. They admitted that the record shows that Bourgeois was discharged from the Navy and was awarded a service connected partial disability pension. They challenge the findings of the district court that Dr. Middleton had found that Bourgeois was disabled "by reason of rheumatic fever acquired while in service of the United States in 1943". The entire argument is predicated upon the fact that they were prepared to show that Bourgeois had had rheumatic fever as a child. The pertinent findings of Dr. Middleton were as follows:

> "The above captioned patient states that in 1943, while serving in the United States Navy he developed rheumatic fever and was hospitalized for a period of seventeen months. He was subsequently discharged with a one hundred percent service connected disability, and he continues to draw this compensation.
>
> Diagnosis: 1. Rheumatic heart disease, inactive
> a. Mitral stenosis and insufficiency
> b. Intermittent auricular fibrillation
> c. Early congestive failure
> 2. Obesity
>
> It is my opinion that this man's heart disease is progressive and the presence of intermittent auricular fibrillation, which is controlled only with large doses of quinidine and digitalis, make it a hazard for this man to sail aboard ship where

> medical care is not immediately available. He should be retired from sea duty; however, I do not feel that he is totally incapable of performing all types of work."

Petitioners do not challenge the doctor's diagnoses, only the interpretation of the Trustees and the court in finding that his disability resulted from service in the Armed Forces. The Trustees acted only after the award to Bourgeois of veterans' disability pension. The provisions of 38 USC 331 read:

> "For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a pre-existing injury suffered or disease contracted in line of duty, in the active military, naval, or air service, ..."

The argument of Petitioners is that the disability of Bourgeois was service connected rather than resulting from service in the Armed Forces of the United States. We submit that it is obvious that the Trustees applied the same interpretation as the statute and as the Veterans Administration does, that is, that his disability ultimately resulted from disease acquired or aggravated while in the service of the United States. The second test applied by the Plan was also satisfied. He was collecting a military service disability pension. Evidence of pre-existing disease which did not disable him from serving in the Armed Forces or prevent him from sailing after he got out of the Armed Forces was immaterial and irrelevant.

ARGUMENT IV. *The court below properly decided the case on the evidence before it and*

properly applied the law prevailing in Louisiana and New York and in the federal courts that Bourgeois was disqualified.

Bourgeois, the claimant, after his discharge from the Navy, began sailing in 1951 and sailed for 10 years until 1961 when the Pension Plan first was created. He was given credit for past time served, including his years from 1951 to 1961. After he had sailed 2 additional years, Bourgeois was eligible for a disability pension if the disability had been incurred as a result of other than military service and he had not been awarded a military pension. Bourgeois' rights clearly did not vest since the Pension Plan provisions disqualified him. It is the universal rule that Pension rights do not vest until the man has actually reached retirement age or is eligible for other reasons for retirement. The rule is clearly set forth in New York in *Kristt vs. Wheland*, 164 NYS 2d 239 (Appeals Division), affirmed 181 NYS 205 (1957), that when the right exists in the trust indenture the trustees may amend and change benefits until such benefits vest as provided in the trust agreement. The same rule has been followed in Louisiana in *State of Louisiana ex rel Murray vs. Board of Trustees of the Police Pension Fund for the City of New Orleans*, 259 So. 2d 613, La. App. 4th Cir. 1972, and *Bowen vs. Board of Trustees of the Police Pension Fund*, 76 So. 2d 430, Ct. App. Orl. 1954. Bourgeois therefore was not deprived of any rights when the Plan as originally created disqualified him. Consequently under the applicable law of either jurisdiction, Bourgeois had no vested rights unless and until such time as he became disabled for reason other than as a result of military service or reached the normal retirement age. In interpreting these funds the federal courts likewise have followed the rules set forth above. Where the terms of the

documents set out the rules for vesting these have been followed strictly by the court. *Lowenstern vs. I.A.M.*, 479 F. ed 1211 (CA 2, 1973); *Schneider vs. McKesson & Robbins, Inc.*, 254 F.2d 827 (CA 2, 1958); *Knoll vs. Phoenix Steel Corp.*, 465 F.2d 1128 (CA 3, 1973). The federal courts have even allowed alterations in eligibility in order to preserve the funds. *Gaydosh vs. Lewis*, 410 F.2d 262 (CA DC 1969).

Nor was the action of the Trustees acting on the same information available to the court in anywise unreasonable, subject to question, or arbitrary or capricious. While the rulings of the Board of Trustees with respect to eligibility and in the administration of the fund are ultimately subject to court review where they have acted properly in making the regulation or interpreting the regulation, the courts will affirm their ruling. *Gomez v. John L. Lewis*, et al., 414 F.2d 1312 (CA 3, 1969) and the same rule is in effect in New York, *Gittelson vs. Dupont*, 215 N.E. 2d 336, and substantially followed in Louisiana, *Davis v. Humble Oil & Refining Co.*, 283 So. 2d 783 (1st Cir. 1973).

CONCLUSION

For the reasons outlined above, Respondents Seafarers respectfully suggest that the application for writs be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 1976, copies of the Opposition to Petition for Writ of Certiorari were mailed to counsel for Petitioners. I further certify that all parties required to be served have been served.

C. PAUL BARKER

§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which

shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101–115 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.